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## FEDERATION OF SABAH INDUSTRIES & ORS v. COMPETITION COMMISSION & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG J
[JUDICIAL REVIEW NO: BKI-25-2-10-2014]
2 APRIL 2015

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***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Order of mandamus and certiorari – Whether Vessel Sharing Agreements (VSA) and Voluntary Discussion Agreement (VDA) in respect of Liner Shipping Services Order (BEO 2014) issued by first respondent could be quashed – Whether conditional BEO 2014 restriction on price fixing of liner shipping services was self contradictory and impossible to enforce – Whether BEO 2014 infringed provisions of Ports and Harbours Enactment 2002 – Whether BEO 2014 ultra vires of Ports and Harbours Enactment 2002 – Whether conditional BEO 2014 for VDA supported anti competition measures – Whether conditional BEO 2014 granted for VSA had benchmark to ensure that objectives of BEO 2014 was achieved – Whether conditional BEO 2014 allowed collusive conduct among participants*

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On 16 December 2011, the second and third respondents, together with the Federation of Malaysia Port Operators Council ('FMPOC'), submitted an application to the first respondent seeking a five-year block exemption for the Vessel Sharing Agreements ('VSA') and Voluntary Discussion Agreement ('VDA') entered into by liner shippers in respect of the entire transport chain including intramodal transport services. In considering the application, the first respondent obtained feedbacks from the Ministry of International Trade and Industry ('MITI'), Ministry of Transport ('MOT'), Ministry of Finance ('MOF') and the Economic Planning Unit ('EPU'). On 14 February 2013, the first respondent, pursuant to s. 9 of the Competition Act 2010 ('Competition Act') published details of the proposed block exemption and conducted a 30 day public consultations which began from 19 February 2013 until 18 March 2013. Subsequently, the first applicant together with 22 other associations in Sabah made two joint submissions to the first respondent against the proposed block exemption. On 19 December 2013, the first respondent granted a conditional block exemption order ('BEO') for Liner Shipping Agreements under s. 8 of the Competition Act. However, on 4 July 2014, the first respondent issued the Liner Shipping Services Order 2014 ('BEO 2014') valid for three years which was published in the gazette on 4 July 2014. The conditions for the block exemption were set out in para. 5 of the BEO 2014. Also, on 7 July 2014, the first respondent issued a news release on the BEO 2014 with an explanatory note. On 3 October 2014, the applicants filed the present application for judicial review ('JR') for an order of mandamus and *certiorari* to quash the VSA and the VDA issued by the first respondent to exempt the VSA and VDA from the s. 4 prohibition

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for a period of three years from the date of the order published in the gazette. The grounds of the applicants for the judicial review, *inter alia*, were that (i) the conditional BEO 2014 with regards to the restriction on price fixing of liner shipping services was self contradictory and impossible to enforce; (ii) the conditional BEO 2014 with regards to the confidential contracts by liner operators allowed them to maintain their dominant position and contradicts s. 10 of the Competition Act which prohibited abuse of dominant position; (iii) the conditional BEO 2014 did not have the benchmark to ensure that the objectives of the conditional BEO was achieved; (iv) the conditional BEO 2014 did not have the corresponding mechanism for implementation and enforcement as required by s. 16(d) of the Competition Act and accordingly was null and void; (v) the conditional BEO 2014 for the VDA supported anti-competition measures; (vi) the conditional BEO 2014 allowed collusive conduct among the participants; (vii) the conditional BEO 2014 as affecting the relevant ports in Sabah was *ultra vires* List IIA in the Ninth Schedule Federal Constitution read together with the Sabah Ports and Harbours Enactment 2002 ('Enactment') and had consequential effects on the shipping under 15 registered tons in Sabah was *ultra vires* List IIIA in the Ninth Schedule Federal Constitution; and (viii) the conditional BEO 2014 was contrary to the liberalisation order which exempted non-Malaysian ships from the provision of sub-s. 65KA(1) of the Merchant Shipping Ordinance 1952 ('Ordinance') to allow competition among liner operators and vessel owners serving ports in West Malaysia, Sabah and Sarawak, thus, allowed collusive conduct among the participants. The applicant further contended that the respondent failed to conduct any market review or after conducting public consultation had failed to publish any report under s. 11 of the Competition Act before issuing the conditional Order 2014 and accordingly was null and void and that the respondent failed to comply with s. 9(b) of the Competition Act read together with the definition of 'publish' in s. 2 of the Competition Act.

**Held (dismissing applicants' application for judicial review with costs):**

**(1)** Although the Competition Act provided for the commission to be set up, it was silent and did not provide for any mechanism, structure, qualification, eligibility, composition and the number of commissioners to be appointed and the quorum for such sittings or consultations. The commissioners were appointed by the Minister in charge with the responsibility for domestic trade and consumer affairs. There was no complaint made against the Minister or the Malaysian Government on such appointments or the of the composition of the Commission. Hence, there were no merit in the applicant's submissions that not one representative of the nine member's of the respondent was from Sabah and its composition hardly reflected a fair representation and that the first respondent had acted as judge, jury and executioner. (paras 38 & 39)

**(2)** The applicants had by a letter dated 28 March 2013 made their first submission. On 18 September 2013 the applicants made their second submission to the first respondent. Clearly, the applicants were given more than 30 days to make both their submissions to the proposed block exemption. (para 42)

**(3)** The first respondent had conducted a market review by consulting MITI, MOT, MOF and EPU and had commissioned the Malaysia Institute of Transports' report. The first respondent had taken into account these consultations and submissions in coming to its decision to grant the BEO. Therefore, the respondent had complied with the procedures set out in s. 9 and s. 11 of the Competition Act. (para 43)

**(4)** For an applicant to pass the adversely effected test, the applicant had to show that he had a real and genuine interest in the subject matter. It was not necessary for the applicant to establish infringement of a private right or the suffering of special damage. This was a public interest case taken up by the applicants on behalf of 22 associations complaining about a level-playing field, fair competition, fair price, high shipping and logistic costs which would affect consumer prices and the costs of living in Sabah. Two submissions have been put in on these issues to the first respondent. As such, the applicants had shown that they have a real and genuine interest and have the right to commence and maintain this application. (paras 44 & 45)

**(5)** The Enactment provided for the control and regulation of traffic by water in ports, harbours and on rivers wholly within Sabah and in the foreshores on respect of ships and vessels under 15 net registered tonnage ('NRT'). Section 8 of the Enactment required all ships under s. 15 of the NRT to be licensed under this Enactment but s. 9 (1)(a) of the Enactment stated that the provision of this Enactment shall not apply to any ship which was duly registered in accordance with the law of any country outside Malaysia. The shipping liners in the BEO 2014 provided shipping services between Sabah and West Malaysia and between foreign countries. Based on these provisions and the licensing of ships or vessels of under s. 5 NRT, this Enactment was not applicable to liner shipping referred to and the subject matter of the BEO 2014. Reading both the Enactment and the BEO, the BEO 2014 did not infringe the provisions of the Enactment and not *ultra vires* of the Enactment. (para 48)

**(6)** The cabotage referred to shipping along coastal routes, port to port and is intended to protect domestic shipping from foreign competition. The Cabotage Policy was introduced in Malaysia on 1 January 1980 which reserved domestic shipping to Malaysian registered vessels. Part IIB of the Ordinance provided for a Domestic Shipping Licensing Board. Section 65A of the Ordinance defined domestic shipping and

sub-s. 65KA(1) of the Ordinance prohibited non-Malaysian ships from engaging in domestic shipping. There was no conflict between the Act, the Ordinance, the Cabotage Policy and the BEO 2014. (paras 50 & 52)

**(7)** The United States ('US') regime recognised the importance of a wider spectrum of collaboration arrangements, including price fixing and supply regulations as essential to sustain a stable scheduled service portion. The BEO 2014 is similar in its approach to the US regime and is based on the current market conditions. The BEO 2014 draws on the principle of reciprocity which required that the trade to the European Union ('EU') and or the US that the agreements *ie*, the VSA and VDA would have to comply with the rules of the EU or US. In this regard, any agreements on price and supply are prohibited in any case under the EU and US rules currently in place. The BEO 2014 adopted this stand. Further there was no was no evidence that the first respondent would not be able to monitor or enforce the conditions or requirements set out in paras. 5 and 6 of the BEO 2014. (paras 60, 61 & 62)

**(8)** The applicants had also not produced any evidence, data on the statistics which showed that the BEO 2014 had resulted in anti-competitive practices which increased the prices of consumer goods in Sabah or that the conditions set out in paras. 5 of the BEO 2014 were irrational or perverse. Any block exemption granted was subject to the conditions authorised by s. 8(5)(a) of the Competition Act. Should any of these conditions not been complied with, the first respondent was empowered to cancel the block exemption under s. 5(5)(b) of the BEO 2014. As such, there was no merits in the applicant's application for judicial relief in the present application. (paras 63 & 64)

**Case(s) referred to:**

*British Airways v. Commission, Case C-95/04 (Unreported)* ***(refd)***

*Haffmann-La Roche AG v. Commission of the European Communities, Case 85/76 (Unreported)* ***(refd)***

*Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy [2008] 1 CLJ 760 CA* ***(refd)***

*Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC* ***(refd)***

*R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***

**Legislation referred to:**

Competition (Block Exemption for Vessel Sharing Agreements and Voluntary Discussion Agreements in respect of Liner Shipping Services) Order 2014, paras. 3(1), (2), (4), (5), 5, 6(1), (2), (3)

Competition Act 2010, ss. 2, 4(1), (2), 5, 8(1), (5)(a), (5)(b), 9(b), 10(1), (2), (3), (4), 11(1), 12, 14

Federal Constitution, arts. 74, 95B(1)(a), (b)

Merchant Shipping Ordinance 1952, ss. 65A, 65KA(1)

Rules of Court 2012, O. 53 r. 3(6)

Sabah Ports and Harbours Enactment 2002, ss. 8(1), 9(1)(a)

Council Regulation No. 4056/86 [EU], art. 81(3)

A *For the 1st, 2nd, 3rd, & 4th applicants - Roland Cheng; M/s Roland Cheng & Co*
*For the 1st respondent - Govinda Raj; M/s Raj & Co*
*For the 2nd & 3rd respondents - Roderick Fernandez (Alvin Leong with him); M/s Shelley Yap*

*Reported by S Kahvitha*

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## JUDGMENT

**Stephen Chung J:**

**[1]** This is an application for judicial review for an order of *mandamus* and
C *certiorari* to quash the Competition (Block Exemption for Vessel Sharing Agreements (VSA) and Voluntary Discussion Agreements (VDA) in Respect of Liner Shipping Services) Order 2014 (BEO 2014) (see SDR1) issued by the first respondent under s. 8 of the Competition Act 2010 (Act) which was published in the Gazette on 4 July 2014 to exempt the VSA and VDA in
D respect of liner shipping services from the s. 4 prohibition for a period of three years from the date of the order published in the Gazette.

**[2]** The first applicant was formerly known as the Federation of Sabah Manufacturers (FSM). The second applicant was previously known as the Jesselton Chinese Chamber of Commerce which is now known as the Kota
E Kinabalu Chinese Chamber of Commerce and Industry. The third applicant was previously known as the Sabah Housing Developers' Association and is now called the Sabah Housing and Real Estate Developers Association (SHAREDA). The fourth applicant is an association representing businesses in the timber industries in Sabah.

F **[3]** The applicants have applied and were granted leave to amend the name and description of the second, third and fourth applicants and to amend the grounds and nature of relief sought in the statement in this judicial review. There was no appeal against the decisions to grant the leave to the second, third and fourth applicants.

G **[4]** The second respondent (Malaysia Shipowners' Association) and the third respondent (Shipping Association of Malaysia) have applied and were granted leave to intervene and to be heard in support of the first respondent in this judicial review application. There was no appeal against the decision for the second and third respondents to be made parties in this judicial review
H application.

**[5]** The Federation of Malaysia Port Operators Council (FMPOC), an association of private ports and terminal operators in Malaysia, is not a party to this application but was a party in the application for the BEO.

I **[6]** On the facts set out in the amended statement, affidavits and submissions, on 16 December 2011 the second and third respondents and FMPOC submitted an application to the first respondent seeking a five year

block exemption for the VSA and DVA entered into by liner shippers in respect of the entire transport chain including intramodal transport services. In considering the application, the first respondent obtained feedbacks from the Ministry of International Trade and Industry (MITI), Ministry of Transport (MOT), Ministry of Finance (MOF) and the Economic Planning Unit (EPU).

**[7]** Pursuant to s. 9 of the Act, on 14 February 2013 the first respondent published details of the proposed block exemption and conducted a 30 day public consultations starting from 19 February 2013 until the closing date of submissions on 18 March 2013 at Kuala Lumpur, Penang, Kuching, Kota Kinabalu and Johor Bahru. The first respondent had received responses and submissions including from the Malaysia Steel and Metal Distributors' Association, Malaysia Hardware, Machinery & Building Materials Dealers' Association, Federation of Malaysia Manufacturers, Malaysian International Chambers of Commerce and Industry. The Federation of Sabah Manufacturers together with 22 other associations in Sabah made two joint submissions to the first respondent against the proposed block exemption (see SDR2 and SDR3).

**[8]** On 19 December 2013 the first respondent granted a conditional block exemption order (BEO) for liner shipping agreements under s. 8 of the Act. On 4 July 2014 the first respondent issued the BEO 2014 valid for three years which was published in the Gazette on 4 July 2014. The conditions for the block exemption are set out in para. 5 of the BEO 2014. On 7 July 2014 the first respondent issued a news release on the BEO 2014 with an explanatory note (see SDR6). On 3 October 2014 the applicants filed this application for the judicial review.

**[9]** Judicial review is not an appeal from a decision but is concerned with the decision-making process. There are now limited exceptions where judicial review may extend to the substance or merits of the decision where there is illegality, irrationality and or proportionality: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; *Jye Tai Precision Industrial (M) Sdn Bhd v. Victoria Arulsamy* [2008] 1 CLJ 760.

**[10]** The Competition Act 2010 was enacted to promote economic development by promoting and protecting the process of competition which encourages efficiency, innovation, entrepreneurship, competitive prices, improvement in the quality of products and services, wider choices for consumers and thereby protecting the interests of consumers.

**[11]** Section 4(1) of the Act prohibits anti-competitive horizontal or vertical agreement between enterprises insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. Horizontal and vertical agreements are defined in s. 2 of the Act.

**[12]** Under subsection (2), a horizontal agreement between enterprises which has the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions, to share market or sources of supply or limit or control production or market outlets or market access or technical or technological development or investment or perform an act of bid rigging is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

**[13]** Notwithstanding s. 4, under s. 5, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under s. 4 based on the following reasons:

(a) there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;

(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods and services.

**[14]** Under s. 8(1), if agreements which fall within a particular category of agreements in the opinion of the Commission are likely to be agreements to which s. 5 applies, the Commission may by an order published in the Gazette grant an exemption to the particular category of agreements. An exemption granted under this section is referred to as a "block exemption" and an agreement which falls within a category specified in a block exemption is exempt from the prohibition under s. 4.

**[15]** The Commission shall before granting the block exemption publish details of its proposed block exemption, gives at least 30 days from the date of publication to allow any submission to be made by members of the public in relation to the proposed block exemption and give due consideration to any submission made: see s. 9 of the Act.

**[16]** Section 10 of the Act prohibits abuse of dominant position which is defined in s. 2 to mean a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.

**[17]** Under s. 10(1), an enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of dominant position in any market for goods or services. What amounts to an abuse of dominant position is set out in sub-s. (2) and include directly or indirectly imposing unfair purchase or selling price or other unfair trading

condition on any supplier or customer or limiting or controlling production, market outlets, market access, technical or technological development or investment or any predatory behaviour towards competitors to the prejudice of consumers.

**[18]** Subsection (3) states that this section does not prohibit an enterprise in a dominant position from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor and the fact that the market share of any enterprise is above or below any particular level shall not of itself be regarded as conclusive as to whether that enterprise occupies or does not occupy a dominant position in that market: see sub-s. (4).

**[19]** The grounds of the applicants for the judicial review are as follows:

(a) The conditional BEO 2014 granted to "allow each liner operator … to offer any arrangement and pricing of its liner shipping services" to the VSA under s. 8 contradicts the restriction therein that the BEO 2014 "shall not contain any element of price fixing, price recommendation or tariff imposition by any person". By reason thereof, the conditional BEO 2014 as regards restriction on price fixing of liner shipping services is self-contradictory and impossible to enforce since the pricing information is shared.

(b) The conditional BEO 2014 granted to "allow each liner operator to enter into confidential contract … of its liner shipping services" contradicts the restriction that the BEO 2014 "shall not require the disclosure of any confidential information concerning the liner shipping service arrangements". By reason thereof, the conditional BEO 2014 as regards confidential contracts by the liner operators allows them to maintain their dominant position and contradicts s. 10 which prohibits abuse of dominant position.

(c) The conditional BEO 2014 granted to the VSA under s. 8 does not identify the significant technological, efficiency or social benefits which directly arose from those agreements as required under s. 5 and accordingly there is no benchmark to ensure that the objectives 3 of the conditional BEO is achieved and hence is *ultra vires* the Act.

(d) The conditional BEO 2014 which exempts the VSA and VDA under s. 8 does not have the corresponding mechanism for implementation and enforcement as required by s. 16(d) and accordingly there is no established mechanism to ensure that the condition of the conditional BEO are complied and is null and void.

(e) The conditional BEO 2014 granted to the VDA for "sharing of information relating to the shipping industry" under s. 8 contradicts s. 4 which prohibits a horizontal agreement between enterprises with the object to "fix directly or indirectly a purchase or selling price…, share market, limit or control market outlets or market access" as it allows the liner operators the opportunity to facilitate collusive conduct among themselves. By reason thereof the conditional BEO 2014 for VDA supports anti competition measures and is null and void under the s. 4.

(f) The conditional BEO 2014 granted to the VSA and VDA under s. 8 is contrary to the liberalisation order dated 03.06.2009 which exempts non-Malaysian ships from the provision of subsection 65KA(1) of the Merchant Shipping Ordinance 1952 (Ordinance) to allow competition among liner operators and vessel owners serving ports in West Malaysia, Sabah and Sarawak. By reason thereof the conditional BEO 2014 allows collusive conduct among the participants and is null and void under s. 4.

(g) The conditional BEO 2014 as affecting the relevant ports in Sabah is *ultra vires* List IIA and List IIIA Ninth Schedule Federal Constitution read together with the Ports and Harbours Enactment 2002. Item 9 of List I in the Ninth Schedule under Article 74 lists shipping and navigation on the high seas as part of the Federal List. However, Item 15 of List IIA in the Ninth Schedule under Article 95B(1)(a) has listed ports and harbours other than those declared to be federal by or under federal law as part of the Supplement to State List for States of Sabah and Sarawak. Further Item 12 of List IIIA in the Ninth Schedule under Article 95B(1)(b) has listed shipping under fifteen (15) registered tons including the carriage of passengers and goods by such shipping as part of the Supplement to Concurrent List for States of Sabah and Sarawak. Therefore, the conditional BEO 2014 will have consequential effect on the shipping in Sabah and Sarawak as regards shipping under Verification Code: 12-471201-1134367-1228544 fifteen (15) registered tons. Further the conditional Order 2014 will have consequential effect on the operations of the ports and harbours in Sabah for which the Ports and Harbours Enactment 2002 is the effective law. The 1st Respondent did not get any feedback from any of the parties affected by Ports and Harbours Enactment 2002. By reason thereof the conditional BEO 2014 is *ultra vires* of Article 74, 95B(1)(a) and (b) read together with the Ports and Harbours Enactment 2002 (Enactment).

(h) The 1st Respondent had failed to conduct any market review or after conducting public consultation had failed to publish any report under s. 11 of the Act before issuing the conditional BEO 2014 and accordingly the conditional BEO 2014 is null and void.

(i) The Respondent action by granting block examination under Section 8 and by giving due consideration to any submission for block examination under Section 9 had failed to distinguish between its role as approving authority under Section 8 and checking authority under Section 9. The Respondent also has duties as investigation authority under Section 14 and enforcement authority under Section 42. By reason thereof, the Respondent had acted as judge, jury and executioner as regards the conditional BEO in breach of the rules of natural justice.

(j) The Respondent by holding a 30 day public consultation starting from 19.02.2013 and ending on 18.03.2013 in five (5) locations had failed to comply with Section 9(b) to "... give at least thirty days

from the date of publication to allow any submission to be made by members of the public ..." read together with the definition of "publish" in Section 2 including the road show held at Kota Kinabalu on 25.02.2013. By reason thereof, the Applicants only have 21 days to reply and the conditional BEO 2014 is null and void in law.

**[20]** In this application the applicants sought the following relief:

(a) The conditional BEO 2014 as regards restriction on price fixing of liner shipping services is self-contradictory and impossible to enforce.

(b) The conditional BEO 2014 as regards confidential contracts by the liner operators allows them to maintain their dominant position and contradicts s. 10 of the Act which prohibits abuse of dominant position. Accordingly the conditional BEO 2014 is *ultra vires* of the Act.

(c) The conditional BEO 2014 does not have the benchmark to ensure that the objectives of the conditional BEO is achieved and hence is *ultra vires* the Act.

(d) The conditional BEO 2014 does not have the corresponding mechanism for implementation and enforcement as required by s. 16(d) of the Act and accordingly is null and void.

(e) The conditional BEO 2014 for VDA supports anti competition measures and is null and void under s. 4 of the Act.

(f) The conditional BEO 2014 allows collusive conduct among the participants and is null and void under s. 4 of the Act.

(g) The conditional BEO 2014 as affecting the relevant ports in Sabah is *ultra vires* List IIA in the Ninth Schedule Federal Constitution read together with the Ports and Harbours Enactment 2002. The conditional BEO 2014 as having consequential effects on the shipping under 15 registered tons in Sabah is *ultra vires* List IIIA in the Ninth Schedule Federal Constitution.

(h) The respondent had failed to conduct any market review or after conducting public consultation had failed to publish any report under s. 11 of the Act before issuing the conditional BEO 2014 and accordingly is null and void.

(i) The respondent had acted as judge, jury and executioner as regards the granting of the conditional BEO 2014 in breach of rules of natural justice.

(j) The respondent had failed to comply with s. 9(b) of the Act read together with the definition of "publish" in s. 2 and accordingly the conditional BEO 2014 is null and void.

**[21]** The applicants submitted that the first respondent failed to play its role effectively as its composition hardly reflects a good and fair representation as not one of the nine members of the Commissions appointed is from Sabah

and that the public consultation held at Kota Kinabalu on 25 February 2013 was only headed by a sole Commissioner who did not give any justification for the block exemption.

**[22]** They submitted that there was no engagement made with Sabah, not even with the State Government of Sabah, in the course of its assessment of the block exemption application. They submitted that for procedural fairness the first respondent should have engaged with Sabah prior to the consultation, in line with the principle of natural justice and that its engagements with the relevant Government agencies were made only at Federal Government level. The applicants claimed that the Government of Sabah was in full support of the industry players in Sabah against the granting of the BEO.

**[23]** The applicants submitted that on 1 January 1980, the Cabotage Policy (cabotage) was implemented to encourage local participations in domestic shipping through local registration of ships and local incorporation of companies participating in domestic shipping. It reserved the transportation of goods in domestic trades to ships flying the Malaysian flag only.

**[24]** They submitted that to implement the cabotage, the Ordinance was amended to include Part IIB and the establishment of the Domestic Shipping Licensing Board. They submitted that s. 65A of the Ordinance defines "domestic shipping" as the use of a ship "to provide services … in the territorial waters of Malaysia …", and "for the shipment of goods or the carriage of passengers" and "from any port of place in Malaysia to another port or place in Malaysia" or "from any port or place in Malaysia to any place in the exclusive economic zone …"

**[25]** The applicants submitted that the VSA and VDA normally involved price-fixing, a direct contradiction to the objectives of the Act. They submitted that they have no intention to harm the shipping industry but expect a level-playing field, fair competition and fair price. They submitted that the first respondent should ensure best business behaviours among liner shipping operators and logistic players and put an end to the perennial high shipping and logistic costs in Sabah. The applicants submitted that there is no established mechanism to ensure compliance with the conditions provided in the BEO 2014 and should not have been granted.

**[26]** The applicants submitted that the liner operators are already in a dominant position with significant market shares and it is not logical to grant the BEO 2014 to them for another three years. They submitted that this will enable them to exploit and strengthen their dominant position, referring to authorities in support of their contentions: see Case 85/76 *Hoffmann-La Roche & Co AG v. Commission of the European Communities*; Case C-95/04 *British Airways v. Commission.*

**[27]** The applicants submitted that based on the experience of the EU which has carried out a thorough review of the industry that liner shipping is not unique as its costs structure does not differ substantially from that of other industries and there is no evidence that the industry needs to be protected from competition. The applicants submitted that therefore no benefits will be derived from the BEO 2014 which has not satisfied the requirements of s. 5 and that the decision to grant the BEO 2014 is null and void.

**[28]** The applicants submitted that the BEO 2014 would give the liner operators the opportunity to exchange information resulting in price fixing either directly or indirectly. They submitted that the second and third respondents have the ingenuity to take advantage of the block exemption in respect of the VDA and the VSA to arrive at some tacit understanding without any obvious breach of s. 4. The applicants submitted that any information given either directly or indirectly would influence other competitors' conduct in the market and likely to have affect pricing and restricting competition contrary to the provisions of the Act.

**[29]** The applicants referred to the submissions made by the second and third respondents as follows:

> (a) ... the Cabotage Policy deals with the requirement of Malaysian ownership or registration of vessels along certain domestic routes. The BEO however related only to VSA – by which liner operators may make arrangements for *inter alia* the joint operations and sharing of vessels – and VDA by which liner operators may exchange and review *inter alia* commercial issues relating to market data – and are entirely distinct from the Cabotage Policy. (Paragraph 12).
>
> (b) the MSO and the Act are 2 different and separate legislations. The BEO which is granted under the Act has no effect on the operations of the MSO. The Cabotage Policy which is a policy under MSO has no relevance to the BEO. (Paragraph 13).

**[30]** The applicants submitted that there are two competing Act of Parliament namely the Act and the Ordinance which affect shipping in Sabah. The applicants submitted that the first respondent failed and did not consider the effect of the BEO 2014 on the liberalisation order which is to encourage competition and to allow more ships in the domestic waters. The applicants submitted that the first respondent's action to adopt the MITRANS report and to conduct a series of public consultations and road shows to obtain public feedback was fatally flawed which showed that it failed to consider the effect of the liberalisation order. It was submitted that this failure would severely affect shipping in Sabah.

**[31]** The applicants submitted that the BEO 2014 would affect the usage of ports in Sabah which falls under the Enactment. The applicants submitted that the Sabah Ports Sdn Bhd which operates all the major ports in Sabah was

never consulted by the first respondent on the BEO 2014 and by reason thereof, the BEO 2014 was contrary to item 15 in List IIA and *ultra vires* of arts. 74, 95B(1)(a) and (b) of the Federal Constitution read together with the Enactment.

**[32]** The applicants submitted that s. 11(1) must be read together with s. 9 of the Act in the context of application for block exemption. It was submitted that after the first respondent had commissioned the Malaysia Institute of Transport (MITRANS) report, it cannot now ignore or hide the MITRANS report without revealing it to the public before requesting for submissions on the proposed BEO. The applicants submitted that the failure to publish the MITRANS report before requesting for submissions from the public was contrary to s. 9 and s. 12 of the Act.

**[33]** The applicants submitted that the respondent by holding a 30 day public consultation starting from 19 February 2013 in five cities had failed to comply with s. 9(b) which states "... give at least thirty days from the date of publication to allow any submissions to be made by members of the public ..." read together with the definition of "publish" in s. 2. It was submitted that the road show was held on 25 February 2013 in Kota Kinabalu and the public consultation ended on 18 March 2013. By reason thereof, the applicants in Kota Kinabalu only had 21 days and not 30 days to reply and the provisions of the s. 9(b) was not complied with.

**[34]** In response, the first respondent submitted that the applicants are not persons who are or would be adversely affected by the BEO and do not have the necessary standing to commence or maintain this judicial review proceedings. It submitted that the conditional BEO was granted and published on 19 December 2013, finalised and published in the Gazette on 4 July 2014 and implementation commenced on 7 July 2014. The first respondent submitted that the applicants only filed this judicial review on 3 October 2014, well after the expiry of the three months. It submitted that the applicants did not give any explanation for the inordinate and inexcusable delay in commencing this application and ought to be dismissed.

**[35]** The first respondent submitted that in granting the conditional BEO which exempted VSA and VDA in respect of liner shipping services, it was satisfied that all the four requirements under s. 5 of the Act had been fulfilled.

**[36]** The first respondent submitted that in granting the BEO 2014, it had considered that there are significant identifiable efficiency benefits arising from the VSA and VDA and that the benefits could not reasonably have been provided by the parties to the VSA and VDA without the agreement having the effect of preventing or distorting the competition. It stated that scheduled and regular services cannot be provided at lower costs and regularity unless there is an agreement between competitors. It submitted that the detrimental effect of the VSA and VDA on competition is proportionate to the benefits provided, that the VSA and VDA do not allow liner operators to eliminate

competition completely in respect of a substantial part of the liner shipping services and that the BEO does not allow any form of price fixing or tariff agreements or recommendation between liners operators. It submitted that the BEO does not exempt or provide immunity in respect of any abuse of a dominant position under s. 10 of the Act.

**[37]** The first respondent submitted that it had called for public consultations, considered the submissions of stakeholders and had commissioned a detailed study by the Malaysia Institute of Transports (MITRANS) (see SDR5) before it granted the BEO 2014 and it had only granted a three year block exemption although the second and third respondents and FMPOC sought a five year block exemption. The first respondent submitted that the proposed block exemption did not cover the whole of the intramodal transport services, applied to post port services only and the land carriage of goods and warehousing services were excluded.

**[38]** I shall now deal with the submissions of the applicants that not one representative of the nine members of the first respondent is from Sabah and its composition hardly reflects a fair representation. They submitted that only one Commissioner sat and heard the public consultation held at Kota Kinabalu on 25 February 2013 and there was no engagement made with State Government of Sabah. It should be noted that the State Government of Sabah did not put in or made any submission or representation during the public consultation and the applicants did not produce any letter that the Sabah Government supported or endorsed the applicants' two submissions although they claimed that the Sabah Government was in full support against the granting of the BEO.

**[39]** Although the Act provides for the Commission to be set up, it is silent and does not provide for any mechanism, structure, qualification, eligibility, composition and the number of Commissioners to be appointed and the quorum for such sittings or consultations. The Commissioners were appointed by the Minister charged with the responsibility for domestic trade and consumer affairs. There was no complaint made against the Minister or the Malaysian Government on such appointments or on the composition of the Commission and the applicants did not join them as a party in the proceedings.

**[40]** The applicants also submitted that the first respondent had acted as judge, jury and executioner by referring to ss. 8, 9 and 14 of the Act. It was submitted that the BEO was in breach of the rule of natural justice. During the hearings of this judicial review application, counsel for the applicants confirmed that they are not challenging these provisions in the Act nor the legality or unconstitutionality of this Act. Therefore there are no merits on these submissions.

**[41]** The applicants submitted that the first respondent by holding a 30 day public consultation starting from 19 February 2013 and ending 18 March 2013 had failed to comply with s. 9(b) in giving at least 30 days from the date of publication to allow any submission to be made. The applicant submitted that they were only given 21 days to reply and there was no market review conducted. The applicants submitted that the conditional BEO is therefore null and void.

**[42]** The facts showed that the applicants by a letter dated 28 March 2013 made their first submission. In the letter the applicants stated "we thank you for the opportunity to present our view during the public consultation held in Kota Kinabalu on 25 February 2013." On 18 September 2013 the applicants made their second submission to the first respondent. Clearly the applicants were given more than 30 days to make both of their submissions to the proposed block exemption.

**[43]** The first respondent had conducted a market review by consulting MITI, MOT, MOF and EPU and had commissioned the MITRANS report. The first respondent had taken into account these consultations and submissions in coming to its decision to grant the BEO. The first respondent had complied with the procedures set out in s. 9 and s. 11 of the Act.

**[44]** Next, the first respondent submitted that the applicants are not persons who would be adversely affected by the BEO and do not have the necessary standing to commence or maintain this judicial proceedings. For an applicant to pass the "adversely affected" test, the applicant has to at least show he has a real and genuine interest in the subject matter. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage: see *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145.

**[45]** Looking at the facts and circumstances of this application, this is a public interest case taken up by the applicants on behalf of 22 associations representing various interest groups in Sabah complaining about a level-playing field, fair competition, fair price, high shipping and logistic costs which would affect consumer prices and the costs of living in Sabah. They have put in two submissions on these issues to the first respondent. They have shown that they have a real and genuine interest and have the right to commence and maintain this application.

**[46]** The facts showed that the first respondent published details of the proposed block exemption on 14 December 2013 and granted a conditional block exemption on 19 December 2013. The BEO 2014 was only published in the Gazette on 4 July 2014. That was the effective date of the BEO 2014. On 3 October 2014, the applicants applied for leave for judicial review to quash the BEO 2014 and leave was granted on 3 November 2014 with no objection by the Senior Federal Counsel appearing for and on behalf of the

Attorney-General. Based on the dates, the application for the judicial review was made within the three month time frame provided in O. 53 r. 3(6) of the Rules of Court 2012.

**[47]** The applicants have submitted that the BEO 2014 have consequences on shipping under 15 registered tons in Sabah which is within the jurisdiction of the State of Sabah as provided in List IIA and List IIIA Ninth Schedule of the Federal Constitution read together with the Sabah Ports and Harbours Enactment 2002. The applicants submitted that the BEO 2014 affecting the ports in Sabah is *ultra vires.*

**[48]** Reading this Enactment, it provides for the control and regulation of traffic by water in ports, harbours and on rivers wholly within Sabah and in the foreshores in respect of ships and vessels under 15 net registered tonnage (NRT). Section 8(1) requires all ships under 15 NRT to be licensed under this Enactment but s. 9(1)(a) states that the provisions of this Enactment shall not apply to any ship which is duly registered in accordance with the law of any country outside Malaysia. The shipping liners in the BEO 2014 provide shipping services between Sabah and West Malaysia and between Malaysia and foreign countries. Based on these provisions and the licensing of ships or vessels of under 15 NRT, this Enactment is not applicable to liner shipping referred to and the subject matter in the BEO 2014. Reading both the Enactment and the BEO, the BEO 2014 did not infringe the provisions of the Enactment and not *ultra vires* of the Enactment.

**[49]** The applicants have also submitted on the Merchant Shipping Ordinance 1952 and the Cabotage Policy. The applicants submitted that the first respondent failed to consider the liberalisation order dated 3 June 2009 under the Cabotage Policy which exempts non-Malaysian ships from the provision of s. 65KA(1) of the Ordinance to allow more ships in domestic waters and to encourage competition among liner operators and vessel owners serving ports in West Malaysia, Sabah and Sarawak. It was submitted that the BEO 2014 would allow collusive conduct among the participants, contrary to the liberalisation order and is null and void.

**[50]** The cabotage refers to shipping along coastal routes, port to port and is intended to protect domestic shipping from foreign competition. The Cabotage Policy was introduced in Malaysia on 1 January 1980 which reserved domestic shipping to Malaysian registered vessels. Part IIB of the Ordinance provides for a Domestic Shipping and Licensing Board. Section 65A defines domestic shipping and s. 65KA prohibits non-Malaysian ships from engaging in domestic shipping. In 2009 the Government implemented the selective liberalisation which allowed foreign vessels to carry cargoes between sectors without domestic licensing, in particular in respect to Sabah, to allow containerised transhipment cargoes arriving in Kota Kinabalu from foreign countries *via* Port Klang.

**[51]** In the BEO 2014, it sets out the following definitions:

> "liner operator" means an enterprise which:
>
> (a) provides liner shipping services; and
>
> (b) is a party to a Vessel Sharing Agreement or Voluntary Discussion Agreement;
>
> "liner shipping service" means any service provided by a liner operator to any transport user upon payment for the containerisation of goods and scheduled transport of the containerised goods, or other scheduled transport of goods, by an ocean transport on a regular basis:
>
> (a) through any particular route between ports; and
>
> (b) in accordance with timetables and sailing dates which are made available and advertised in advance,
>
> but shall not include full vessel chartering arrangements with any transport user such as a tanker and bulk vessel services;
>
> "Vessel Sharing Agreement" means an agreement between liner operators in which the parties to such agreement shall only discuss and agree on operational arrangements relating to the provisions of liner shipping services, including the coordination or joint operation of vessel services, and the exchange or charter of vessel space;
>
> "Voluntary Discussion Agreement" means an agreement between liner operators in which the parties to such agreement may exchange and review commercial issues relating to market data, supply and demand forecast, international trade flows and industry trends, voluntary and non-binding guidelines.

**[52]** Reading the Act, the Ordinance, the Cabotage Policy and the BEO 2014, there is no conflict between them. The applicants complained that the BEO allow the liners to maintain their dominant position and would reduce competition, affect the high shipping costs for Sabah and increase the prices of consumer goods in Sabah. It is not in dispute that there are not many vessels registered in Sabah or owned by businesses in Sabah providing shipping services between Sabah and West Malaysia and there are not many or enough products being exported or transported to West Malaysia from Sabah on the return leg of ships serving between Sabah and West Malaysia. This is a key factor which contributes to higher shipping costs between these two.

**[53]** After 30 years, very little initiatives have been taken by the State Government and businesses in Sabah, including the applicants which represented the 22 interest groups in Sabah, to alleviate or improve this problem. This is a subject of great debate by businesses and interest groups inside and outside Sabah and whether Cabotage Policy should be abolished or amended or improved. This involves Government policy which is a work

in progress and pending a decision by the Government. This is a policy decision, within the realm of the Governments and not an issue that should be decided by the court in this judicial review application.

**[54]** Referring to the MITRANS report, containerised liner shipping services has evolved and is global in nature. Almost 80% of world trade is transported *via* international containerised liner shipping services on scheduled basis which has become a major component of international maritime transport industry. Due to the nature and costs structure of the liner shipping services, economy of scale and cost efficiencies become critical and have pushed liners to operate in horizontal or vertical co-operations or agreements including liner conferences, alliances, sharing information, sharing schedules, routes, linkages, exclusive deals, technical agreements and takeovers of smaller or competing liners.

**[55]** Malaysia's external trade is well served by liner shipping services provided by the largest shipping companies in the world. It has a high liner shipping connectivity index of 90.96 as at 2011 and is ranked no. 7 in the UNCTAD Review of Maritime Transport 2011.

**[56]** These shipping companies are known to have operated in horizontal collaboration agreements as part of their global network of services in providing their containerised maritime linkages with Malaysia's external trade for as long as records are available. They are a major contribution to the growth of the nation's economy which is driven by the inflow of foreign direct investments into the manufacturing sector that generate containerised cargo. This has resulted in spin-offs into related logistics activities including road haulage, port operations, warehousing and integrated logistics services where multimodal transport services are the underlying way of transporting these containers and goods. Any changes to this mode of operating in engaging horizontal agreements could likely disrupt Malaysia external trade where goods are predominantly moved *via* containers and liner shipping.

**[57]** Previously the European Union (EU) had issued Regulation (EEC) No 4056/86 and granted block exemption for liner conferences on the grounds that they brought stability, assuring shippers of reliable services and an efficient scheduled maritime transport services. By 2000, the regulatory regime was moving towards a more restrictive approach.

**[58]** In October 2006 the EU had abolished Regulation 4056/86 on the grounds that the four conditions in art. 81(3), which is equivalent to s. 4 of the Act, were no longer fulfilled, that the liner conferences are no longer able to enforce the conferences tariff and that the block exemption for liner shipping has not been found to be of any appreciable effect on freight rates or on reliable shipping services. That decision was based on the changing landscapes in the EU.

**[59]** However, the United States of America (US) continues to allow price fixing and supply regulations agreements although these have been severely restricted in their content following major revisions introduced by OSRA in 1999. These regulatory restrictions under the US rules allow for a greater degree of internal competition which can be seen through the following provisions:

(a) Carriers are allowed to use independent and confidential service contracts when providing services to their shippers. These contracts introduce a greater level of internal competition among members of these conference type agreements and allow greater level of independent actions on the part of member lines operating in any joint agreement.

(b) Carrier discussion agreements (CDA) (similar to VDA) are allowed, that basically enable the joint sharing of information among carriers so long as the outcome is not in the form of a price commitment among those sharing the information.

(c) Operational efficiency agreements are encouraged, such as multinational alliances and container consortia, both of which are designed to enhance utilisation of ships deployed without including any element of price fixing within operation.

(d) Intermodal authority that allow intermodal prices at the level of the agreement has been put in place in the US since the Shipping Act of 1984.

**[60]** It is evident from the range of provisions that the US regime recognises the importance of a wider spectrum of collaboration arrangements, including price fixing and supply regulations as essential to sustain a stable scheduled service portion. The BEO 2014 is similar in its approach to the US regime and is based on the current market conditions.

**[61]** It should be noted that the BEO 2014 draws on the principle of reciprocity which requires that the trade to the EU and or US that the agreements ie the VSA and VDA would have to comply with the rules of the EU or US. In this regard, any agreements on price and supply are prohibited in any case under the EU and US rules currently in place. The BEO 2014 adopted this stand.

**[62]** Paragraph 6(1) of BEO 2014 requires that a copy of VSA and VDA be filed by one of the liner operators with the first respondent within two weeks from the date of signing. Any variation or amendment made to the VSA or VDA must be filed within two weeks from the date of the variation or amendment: 6(2). Any variation or amendment not made in writing, then a memorandum setting out the variation or amendment must be filed within two weeks from the date of variation or amendment: 6(3). There is no evidence that the first respondent will not or be able to monitor or enforce the conditions or these requirements set out in paras. 5 and 6 of BEO 2014.

**[63]** The applicants have also not produced any evidence, data on statistics which showed that the BEO 2014 has resulted in anti-competitive practices which increase the prices of consumer goods in Sabah or that the conditions set out in para. 5 of BEO 2014 are irrational or perverse. Any block exemption granted is subject to the conditions authorised by s. 8(5)(a) of the Act. Should any of these conditions not be complied with, the first respondent is empowered to cancel the block exemption under s. 8(5)(b).

**[64]** For the reasons given, there are no merits in the applicants' application for the relief in this judicial review application. The application is therefore dismissed with costs of RM2,000 to the first respondent and costs of RM2,000 to the second and third respondents jointly.